No. 90-1157

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IN THE

Supreme Court of the United States

October Term, 1990

TODD PACIFIC SHIPYARDS CORPORATION

and

AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

and

MARGARET L. JOHNSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

Respondent adopts the Administrative Law Judge's (hereinafter ALJ) recitation of the facts. (Appendix A, Brief of Petitioner.) That record established the following facts. In December, 1979, while working as a shipscaler at Todd Shipyard, Respondent Johnson fell, injuring her hands. At that time her pre-injury wage was stipulated to be $259.32. She returned to intermittent work until she underwent bilateral carpal tunnel surgery. The physical impairment of her hands was subsequently determined to be 20% by her surgeon. Respondent returned to work, sometimes intermittently, until she injured her back at Todd Shipyard in August, 1980. As to that date, her pre-injury wage was stipulated to be $519.29. Following treatment for her back, Respondent again returned to work, sometimes intermittently, until May, 1983, the date ALJ found her to

be totally disabled on the basis of "tendinitis and arthritis which affects her hands."

CERTIORARI SHOULD NOT BE GRANTED

The pertinent language of the Longshore Act, 33 U.S.C. § 910, § 902(2), § 908(a), is unambiguous. The decision of the Court of Appeals is well within the clear language of the Act and its interpretation by the courts. See, e.g., Saif Corp./Oregon Ship v. Johnson, 908 F.2d 1434 (9th Cir. 1990); Todd Shipyards Corporation v. Black, 717 F.2d 1280, cert. denied, 466 U.S. 937 (1983).

The decision of the ALJ to apply the average weekly wage closest to the 1983 manifestation of Respondent's permanent total disability is supported by the record. Evaluation of evidence is within the appropriate discretion of the ALJ O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 362, 85 S. Ct. 1012, 13

L. Ed. 2d 895 (1965). Both parties stipulated to a 1980 average weekly wage. The fact that the amount of that wage was given in relation to another on the job injury is inconsequential. The stipulated amount is the appropriate basis for the calculation of her compensation rate for permanent total disability.

The ALJ explanation of the basis for his decision is in compliance with the Administrative Procedure Act (5 U.S.C. §§ 554, 557(c)). See, O'Keeffe, supra, at 362.

A. **The Opinion Below Was Correct.**

The opinions of the Court of Appeals and the ALJ are rooted in well-established case law interpretations of the Longshore and Harbor Workers Compensation Act (LHWCA). The Ninth Circuit appropriately reviewed only the legal questions ruled on by the Benefits Review Board (BRB).

1. The opinion below correctly construed the Act.

The Ninth Circuit Court of Appeals is correct in its reading of the Act. Respondent claims that the court correctly interpreted the Act in light of the definition provided in § 902(2), which defines injury as:

> [a]ccidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury.

(Emphasis added.)

Petitioner on the other hand focuses on the allegedly inappropriate interpretation of § 910(i). Nothing in the Court of Appeal's opinion or in the opinion of the ALJ indicates that § 910(i) was used to determine the compensation rate in this case. The ALJ decision was rendered in July, 1984, two months before § 910(i) became law. Furthermore, § 910(i) does not

apply to the instant case. The 1984 Amendments to the Act addressed the inequities of occupational disease victims such as asbestos workers whose exposure did not result in impairment until decades later. The issue in such cases is whether to apply the wage rate as of the date of exposure or the wage rate at the date of manifestation. See, e.g., Aduddell Owens-Corning Fiberglas, 16 B.R.B.S. 131 (1984). Congress resolved those issues in 1984. See, e.g., § 910(d)(2) and (i). They have nothing, however, to do with Respondent Margaret Johnson's case. Respondent had a physical injury followed directly by the occupational diseases of traumatic tendinitis and arthritis.

The Longshore Act, 33 U.S.C. § 910, provides for three alternative methods for computing the appropriate compensation rate. The ALJ has broad discretion (Banner v. Nat. Steel & Shipbuilding Co., 5 B.R.B.S. 290

(1970), aff'd in pertinent part, 600 F.2d 1288 (9th Cir. 1979)) to reach a fair and reasonable approximation of a claimant's wage-earning capacity (Barker v. Tri-State Terminals, Inc., 3 B.R.B.S. 244 (1976), aff'd sub. num., Tri-State Terminals, Inc. v. Jessi, 596 F.2d 752 (7th Cir. 1979)).

The scheme of the LHWCA provided the ALJ with the discretion to award compensation to Ms. Johnson, in its definitions § 902(2) and in the alternative methods of calculation in § 910(a), (b) and (c). The ALJ applied the clear language of these sections in making the determination of Ms. Johnson's compensation.

As can be seen, the court below did not rely upon the inapplicable 1984 amendments, but, rather, applied its own previous interpretations of the Act (see, e.g., Todd Shipyard Corp. v. Allen, 666 F.2d 399 (9th Cir.), cert. denied, 459 U.S. 1034 (1987);

Todd Shipyard Corp. v. Black, supra) in deciding this case.

The language of the Act is not ambiguous and the Board as well as the courts have so held. See, Del Vacchio v. Sun Ship Building & Drydock Co., 16 B.R.B.S. 190, 193 (1984).

Petitioner cites Del Vacchio, supra, for the proposition that payments are based on an average weekly wage rate at the time of injury for which compensation is claimed. However, "a work related aggravation of a pre-existing injury is compensable in itself under the Act and is considered a new injury." Del Vacchio at 193, citing Chiarella v. Bethlehem Steel Corp., 13 B.R.B.S. 91 (1981). Therefore, "average weekly wage in aggravation cases must be based on the claimant's earnings at the time of the aggravation." Del Vacchio, at 193. Based on this reasoning, the Board in Del Vacchio reversed and awarded compensation

based on wages at the time of the aggravation of the injury, thus using 1978 wages rather than 1973 wages. Id. at 193.

The Ninth Circuit decision in the instant case noted that the LHWCA compensates occupational disability, not physical injury. (Appendix C-7, Brief of Petitioner.) Section 902(10) defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The court noted that "[w]e have interpreted the word injury to mean the date of disability rather than the time of the accident . . ." (Appendix C-7, Brief of Petitioner.)

In 1979, Respondent Johnson suffered hand injuries that eventually required surgery. The following year Respondent suffered a back injury. Between 1980 and 1983, Respondent worked only sporadically as a result of both the back injury and the

carpal tunnel syndrome. By May of 1983, however, Respondent was unable to continue her employment as a ship scaler because of the work related aggravation of the arthritis and tendinitis in her hands. Whether the arthritis and tendinitis are an "occupational disease" or the result of an "injury" is essentially irrelevant under the Act. The outcome is the same. Respondent is permanently unable to engage in reasonably continuous employment, and is, hence, totally and permanently disabled.

Contrary to Petitioner's assertion, it was unnecessary for the Ninth Circuit to expand the language of the Longshore Act to determine the correct compensation rate. Rather, it could apply the broad language of the Act to one of the situations contemplated by the statutory framework. The court below relied upon Todd Shipyards Corp. v. Black, supra, to draw an analogy

between latent injuries and occupational disease:

> Although Black involved an occupational disease, both its rationale and dicta indicate that its holding should apply to the manifestation of latent and unknown injuries as well. Black did not distinguish between occupational disease and occupational injury, but rather treated both terms similarly.

Ninth Circuit Opinion. (Appendix C-6, Brief of Petitioner.)

Whether a compensable total disability stems from an injury and its sequelae or from a traumatic injury followed by a disease process, the compensation rate may properly be based upon the date of disability, rather than the date of the accident or the date of occupational exposure.

2. The opinion below is well within the established case law.

The Court of Appeals correctly applied the Act in determining Respondent's compensation rate. Since the issue was

clear, the court found it unnecessary to indulge in the fanciful statutory construction suggested by Petitioner.

Petitioner cites Pillsbury v. United Engineering Co., 342 U.S. 197, 199-201 (1952) and Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 1094 (5th Cir. 1990) for the proposition that inequitable results may not be avoided by an improper construction of the Longshore Act. In the instant case, the Ninth Circuit did avoid an inequitable result, but by following the plain language of the statute. Furthermore, Pillsbury, supra, is factually distinguishable. In Pillsbury, the claimant's injury was "patent," not "latent." Both terms are clearly defined in the Act. Obviously, to have misapplied a well defined term of art would have changed the intent of Congress. The opposite is true here. Congress established three distinct categories for which compensation

could be awarded -- traumatic injury, disease resulting from injury, and late manifesting occupational disease.

In the case of disability resulting from physical injury the compensation rate can, but need not always, be based upon the pre-injury wage. This is only logical. An injury is a necessary cause for economic disability but such disability is not a necessary outcome of an injury. Congress contemplated this by establishing a compensation scheme based upon the loss of wage-earning capacity rather than mere physical impairment. See, 33 U.S.C. § 908.

Petitioner chooses to ignore the court's reasoning. Determining the date on which compensation should be based, the Ninth Circuit very clearly interpreted the word "injury" to mean the date of disability, citing Todd Shipyards Corp. v. Allen, 666 F.2d 399, 401-02 (9th Cir. 1982), cert. denied, 459 U.S. 1034 (1982). In

Allen the statute of limitations was deemed to begin to run when the claimant became aware of the full character of his harm. (Appendix C-7, Brief of Petitioner.)

The court below also cited J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 183-84 (9th Cir. 1990) for the proposition that the word injury means the date of disability. The employer in Martinac argued that the statute of limitations was triggered at the point of claimant's accident. The court held that even where a claimant suffered temporary disability, the statute did not begin to run until the claimant learned his disability was permanent. Martinac, supra. (Appendix C-7, Brief of Petitioner.)

Finally, the Ninth Circuit cited Stancil v. Massey, 436 F.2d 274, 278 (D.C. Cir. 1970). The D.C. Circuit distinguished the terms "injury," "disability" and "accident." The Ninth Circuit adopted the

reasoning of Stancil to the effect that Congress:

> [d]id not intend to tie injury to the fixed point of the accident. Rather, injury "should encompass physical harm of a kind which is unknown to the employee at the time of the accident, but which is later revealed, such as an occupational disease or a latent wound."

(Emphasis added.) (Appendix C-8, Brief of Petitioner.)

The Ninth Circuit concluded that Respondent Johnson suffered an injury to her hands in 1979, but was not "injured" in the sense of permanent economic disability until 1983, when she could no longer work. That holding is in line with the accepted interpretation of the statute followed by the Ninth Circuit in previous decisions (Todd Shipyards v. Black, supra; Todd Shipyards v. Allen, supra; Martinac, supra) and by other circuit courts. Stancil v. Massey, supra; Marales v. General Dynamics Corp., 769 F.2d 66 (2d Cir. 1985); Bath Iron

Works Corp. v. Galin, 605 F.2d 583 (1st Cir. 1979). In addition, this Court has denied certiorari in cases where these terms and this statute was involved. Todd Shipyards Corp. v. Allen, supra, cert. denied, 459 U.S. 1034 (1987); Todd Shipyards Corp. v. Black, supra, cert. denied, 466 U.S. 937 (1983).

The logic of the Ninth Circuit's opinion is unassailable, to wit:

> [w]ere we to hold that benefits should be based on wages at the time of a potentially disabling accident, we would discourage workers like Johnson from attempting to return to work.

(Appendix C-8, Brief of Petitioner.) As is evident from the record, Respondent Johnson did indeed continue to work in spite of her injuries until March 1983 when she no longer could perform her job.

Petitioner compares the instant case with Ingalls, supra. However, Ingalls is distinguishable because Mr. Ingalls was already retired. In 1984, Congress

established a different scheme for retirees (§ 910(d)(2)), and the petitioner in Ingalls sought an interpretation of the statute which was inconsistent with that scheme.

Finally, Petitioner cites Rubin v. United States of America, 449 U.S. 424, 430 (1981) for the proposition that when the terms of a statute are unambiguous, judicial inquiry ends. We agree. However, Petitioner urges ambiguity where none exists. Indeed, the Act was intended by Congress to be given a broad and liberal interpretation. United States Dept. of Labor v. Pirini North River Assoc., 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983); Avendale Shipyards, Inc. v. Kennel, 914 F.2d 88 (5th Cir. 1990); Stevensen v. Linens of the Week, 688 F.2d 93, 223 U.S. App. D.C. I (1982); Holcomb v. Robert W. Kirk & Assoc., Inc., 655 F.2d 589 (5th Cir. 1981), cert. denied, 459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1981).

Petitioner seeks a narrow interpretation which conflicts with the congressional intent to compensate future wage loss based upon a fair assessment of actual wages or wage-earning capacity.

3. The decision below is supported by the evidence -- the requirements of the Administrative Procedure Act were satisfied.

Petitioner is correct in asserting that 5 U.S.C. § 557(c) requires the ALJ to give reasons for the basis of his findings and conclusions. In the instant case, the ALJ did state which factors he considered important. In determining the amount of claimant's average weekly wage, he relied on the best evidence available to him.

The most recent weekly wage to which both parties stipulated was $519.29 as of August 11, 1980. Furthermore, both parties stipulated the claimant was last employed May 19, 1983. There were no disputes between the parties as to the sporadic work

record in the intervening period of time from August 1980 to May 1983.

Petitioner reads the ALJ's paragraph on determination of average weekly wages as if it had no context. The ALJ's determination comes after a complete discussion and evaluation of the evidence and concludes that the best evidence available leads to the determination of wages. To construe the decision otherwise would be to take the paragraph on wages completely out of its logical context within the decision.

Petitioner contends that the stipulations regarding average weekly wages were specific with respect to the date of injury, type of injury and dollar amount. While it is true that the stipulations were specific, it is irrelevant. The fact that both parties stipulated to the quantum of weekly wages indicates that there is no dispute as to those amounts. The ALJ used the stipulations to ascertain the best

evidence of Respondent's wage-earning capacity.

Petitioner cites Betts v. Arthur Snowden Co., 14 B.R.B.S. 805 (1982) for the proposition that an ALJ is not obligated to accept all stipulations but must adequately explain a rejection or modification of any such stipulation. Betts does not address the issue of an ALJ accepting stipulations. Rather, it addresses the issue of resolving conflicting evidence by the use of the "resolving doubts rule." Here there was no conflicting evidence.

In O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 362, 85 S. Ct. 1012, 13 L. Ed. 2d 895 (1965), this Court stated that:

> [i]n cases decided both before and after the passage of the Administrative Procedure Act, 5 U.S.C. § 1001, et seq. (1958 ed.), the Court has held that the foregoing statutory provisions limit the scope of judicial review of the Deputy Commissioner's determination that a "particular injury arose out of and in the course

> of employment" . . . It matters not that basic facts are disputed . . . the fact that the inference . . . involves an application of a statutory term or phrase to a specific set of facts, gives rise to no greater scope of judicial review.

This Court thus concluded that judicial review is not appropriate in cases such as the instant case, unless the inferences drawn are "irrational" or "unsupported by substantial evidence on the record . . . as a whole." Id.

The Ninth Circuit correctly analyzed § 910 as proving compensation for loss of future earnings and correctly concluded that compensation based on wages as of the date of the earlier physical injury would be both unjust and inconsistent with the Act.

CONCLUSION

The Ninth Circuit Court of Appeals and the ALJ correctly applied the law to the facts of this case. The ALJ complied with the requirements of the Administrative

Procedures Act. Hence, the opinion below should stand.

RESPECTFULLY SUBMITTED this 11th day of February, 1991.

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